Supreme Court, U.S.
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No. 93-1886

In The

Supreme Court of the United States

October Term, 1994

T. I. CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

KIEWIT EASTERN COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VICTOR P. STABILE
[Counsel of Record]
GERALD E. BURNS, III
DILWORTH, PAXSON, KALISH
& KAUFFMAN
305 N. Front Street, Suite 403
Harrisburg, PA 17101
(717-236-4812)

Attorneys for Petitioner

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I STATEMENT OF THE CASE

Kiewit faults T.I. for not alerting this Court to the fact that Kiewit allegedly maintained a 10% utilization goal during the entire course of the project. This fact is irrelevant in light of USDOT's DBE Program Administration Participant's Manual which expressly provides that a prime contractor is to exert good faith efforts to replace/substitute DBE's **unable or unwilling to perform during the life of the contract, regardless of the prime's DBE participation percentage committed at the award of the contract.** App. at A-41 – A-42. The Manual is designed to issue long-lasting detailed policy and procedure. See 23 C.F.R. §1.32(b)(5). The DBE program's goal to ensure DBE's a maximum opportunity to perform encompasses more than just satisfying a utilization goal. It also precludes the termination of a DBE, unless the DBE is unable or unwilling to perform. This Court's review is necessary to settle whether the DBE program goes beyond establishing participation goals and also prevents termination of DBE's who are performing satisfactorily.

In an attempt to belatedly justify its action, Kiewit misleads the Court by insisting that T.I. continually accused Kiewit of fraud during the course of the project, thus justifying the convenience termination. The evidence relied upon by Kiewit to support this statement consists solely of T.I.'s allegations of fraud first made in its complaint and information gained during discovery. In fact the district court's opinion (App. A-11 – A-17), upon which Kiewit relies, references only post termination allegations. The December 27, 1990 USDOT letter cited by

Kiewit is devoid of any mention of fraud as the basis for terminating T.I.'s contract. To the extent Kiewit attempts to paint this termination as one for cause, it ignores the district court's opinion which accepted as fact that the parties both presumed the termination was for convenience. (App. A-8 – A-9).

Kiewit also attempts to dissuade this Court from granting review by alleging that T.I. has selectively quoted relevant regulations and manuals. Relevant statutes and regulations were set forth at length in T.I.'s petition. Kiewit's own selective quotation of relevant regulations and letters only serves to demonstrate that there is in fact inconsistency between the DBE statute, USDOT's regulations and the unique letter ruling issued by USDOT in this case.

Finally, Kiewit attempts to persuade the Court that this matter should not be considered since T.I. has already litigated this issue in multiple judicial and administrative proceedings. Those proceedings, as summarized by the district court,[1] were not the proper forums in which to seek the relief sought by T.I. It is therefore misleading to suggest that the issue presented for review has been litigated by T.I. without success in a number of different forums.

II ARGUMENT

1. This Court must clarify the goals of the DBE program.

Kiewit urges that this case does not warrant review because the DBE program's goal to prevent discrimination

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[1] See, district court's Opinion at note 8 (App. A-8)

has not been undermined in this case. Kiewit's position is understandable, since the lower court decision allows prime contractors like Kiewit to terminate a DBE for convenience without sufficient justification,[2] regardless of their own culpability.

The maximum opportunity to perform is what enables a DBE to compete in the marketplace. Through increased participation DBE's grow, become independent and the historic evils of discrimination defeated. If the DBE program cannot guarantee at least the minimum level of protection for DBE's to perform and complete work, then the program is illusory. Terminations for convenience can therefore serve as a pretext for discrimination by making it too easy for a prime to defeat the laudatory goals of the DBE program.

The requirement that a prime contractor honor its commitment to originally designated DBE's should stand independent of the prime's responsibility to meet DBE goals. The prime's representation that it will meet DBE goals with originally designated DBE's is one of the bases upon which a State awards a contract. If this is to mean anything, it must at a minimum protect DBE's who incur costs to prepare for work and from being denied the opportunity to perform without sufficient justification. Review by this Court is necessary so that convenience terminations cannot be used to defeat the purposes to be achieved under the DBE program.

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[2] In fact, the termination notice received by T.I. was completely silent as to the reason for the convenience termination. See, district court Opinion at A-7.

2. USDOT's conflicting interpretations of its regulations warrant review.

Kiewit attempts to draw this Court's attention away from USDOT deciding this case in a manner that is inconsistent with its prior agency-wide pronouncements by attempting to reconcile USDOT's agency-wide directives with the unique letter determinations written by USDOT in this case. Despite Kiewit's best efforts, USDOT's pronouncements cannot be reconciled with the unique letter rulings issued here. Perhaps the most glaring omission in Kiewit's attempt to reconcile USDOT's pronouncements with the letter rulings in this case is Kiewit's failure to acknowledge that the program Manual is to be treated, by regulation, as issuing long-lasting policy and procedure. See, 23 C.F.R. §1.32(b)(5). Kiewit ignores this regulation and rather, relies upon boilerplate for the proposition that agency manuals generally have no legal force and do not bind the agency.

Significantly, Kiewit does not dispute that review should be granted where agency conduct is present which demonstrates varying interpretations of its own regulations. This constitutes an abuse of agency discretion to which the courts cannot defer.

3. The damage limitation clause in the parties' contract should not be the basis for denying review.

Kiewit suggests that this case not be reviewed because the constructive termination for convenience provision in the parties' contract precludes the damages

sought by T.I.[3] The constructive termination provision, however, should only be interpreted to apply to wrongful default terminations. It would be absurd to construe this provision to mean that if Kiewit wrongfully terminated T.I. for convenience, Kiewit may treat it as one for convenience anyway. This would be especially so if the DBE regulations prohibit the convenience termination in this case. If the Court cannot decide this as a matter of law, this issue, at the very least, would constitute a contract ambiguity to be resolved by the appropriate fact finder. As such, this provision should not deter this Court from granting review on an otherwise important question of federal contract law.

Respectfully submitted,

VICTOR P. STABILE
GERALD E. BURNS, III
DILWORTH, PAXSON, KALISH
& KAUFFMAN
305 N. Front Street, Suite 403
Harrisburg, PA 17101
(717-236-4812)

Dated: September 20, 1994

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[3] The constructive termination for convenience provision at Section 6(g) of the parties' subcontract provides:

> **Upon a determination by a court of competent jurisdiction that termination of Subcontractor or its successor in interest pursuant to any provision of this Subcontract was wrongful, such termination will be deemed converted to a termination for convenience and the Subcontractor's remedies shall be limited to those set forth in Subsection 6(e).**